IN THE

Supreme Court of the United States

October Term, 1979

No. 79-448

TOMMY REID, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

DENNIS S. MACKIN, Esq.
1550 Peachtree Summit Bldg.
401 West Peachtree Street, N.E.
Atlanta, Georgia 30308

Attorney for Petitioner

INDEX

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INDEX TO APPENDICES

IN THE

Supreme Court of the United States

October Term, 1979

No. _____

TOMMY REID, JR.,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

The Petitioner respectfully prays that a Writ of Certiorari be issued to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on April 4, 1979.

THE OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet recorded, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The judgment of the Georgia Court of Appeals which was entered on April 4, 1979 and amended on April 24, 1979. An application for rehearing was timely filed and denied by the same order of amendment. A copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition

for Writ of Certiorari on June 20, 1979. A copy of said denial is set forth herein in Appendix C. The Court's jurisdiction is invoked under Title 28, United States Code Section 1257(3).

THE QUESTION PRESENTED

1.

Whether the establishment of a drug courier profile by law enforcement personnel creates an "articulable suspicion" upon which law enforcement personnel may intrude upon the freedom of the citizens of the United States in violation of the Fourth Amendment to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions to the Fourth Amendment to the United States Constitution are set forth in Appendix D hereto.

STATEMENT

This case originated from the arrest of the Petitioner Tommy Reid, Jr. as he exited the terminal of the Atlanta Hartsfield Airport in Atlanta, Georgia on August 14, 1978. In the course of the arrest, drugs were seized, allegedly in the possession of Tommy Reid, Jr.

The Petitioner was indicted in the Superior Court of Fulton County, Georgia and the Petitioner filed a Motion to Suppress alleging the violation of his constitutional rights, including his right to freedom from unreasonable search and seizure under the Fourth Amendment to the United States Constitution.

A hearing was held before a Judge of the Superior Court regarding said Motion and the trial court ruled that the evidence seized should be suppressed and the evidence seized would be inadmissable against the Petitioner in the trial of his case.

The actual circumstances of the arrest were as set out below. Agent Mathewson of the Drug Enforcement Administration of the Department of Justice was stationed at the Airport and upon viewing the Petitioner arriving on a flight from Ft. Lauderdale, Florida, the agent followed the Petitioner. At the hearing of the case Agent Mathewson denied that he had based his stop of the Petitioner on the drug courier profile. Agent Mathewson testified that his duties involved surveillance of the Atlanta Airport with the purpose of interdicting drug couriers. On August 14, 1978 at approximately 5:10 a.m. Agent Mathewson was conducting a surveillance of arriving passengers at the Atlanta Hartsfield Airport, Gate 41, at which time Delta Air Lines flight 838 was arriving from Fort Lauderdale, Florida. He had previously observed a flight from Los Angeles, California.

Agent Mathewson testified that he had been trained in the techniques of airport surveillance by DEA Agent Marconi, who had developed a "profile" of drug couriers while working at the airport in Detroit, Michigan. Agent Mathewson testified that the "profile" consists of eleven factors which are used to determine those persons who will be stopped for investigation and pat-down search at airports. Agent Mathewson enumerated ten of these factors that consist of:

1. Arrival from a source city, which could include Los Angeles, California; Fort Lauderdale, Florida; Miami,

Florida; San Diego, California; San Francisco, California; or West Palm Beach, Florida.

2. Lack of an appreciable amount of luggage.
3. Attempting to conceal the fact that one is accompanied by another person.
4. Paying for flight tickets in bills of small denominations.
5. Nervousness.
6. Telephone call immediately upon arrival at the airport.
7. Using taxi or other public transportation.
8. Having associations with known drug dealers.
9. Having large amounts of cash on one's person.
10. Fraudulent identification.

Upon viewing the Petitioner Tommy Reid, Jr., as he left the gate area, Agent Mathewson testified that the Petitioner moved toward the terminal and seemed to be looking back towards another person, later identified as Claude Willams. After reaching the terminal concourse, Williams joined the Petitioner and they exited the terminal. The agent noted that Williams and the Petitioner were carrying purses and both men were black. (Agent Mathewson testified that neither the fact that the men were black nor the fact that they had purses gave him any cause for suspicion.)

Agent Mathewson followed Williams and the Petitioner out of the airport where they were about to cross the traffic lanes and at that time tapped one of them on the shoulder.

In response to cross-examination at the trial of this motion, Mathewson admitted that only the following conclusions on his part had aroused his suspicion: (1) that Williams and the Petitioner had arrived from a primary source city for cocaine in the United States; (2) that they had chosen a time to arrive when law enforcement is at its lowest; (3) that the men appeared to be making a distinct effort to conceal the fact that they were traveling together; and (4) that the men were carrying no luggage beyond their purses and it appeared that they did not intend to claim any luggage.

Mathewson denied having stopped the Petitioner and Williams by tapping one of them on the shoulder at the hearing, but upon cross-examination was not sure whether or not he had admitted to having tapped one of them on the shoulder at a previous preliminary hearing. A transcript of this preliminary hearing was subsequently entered on behalf of the Petitioner showing that Agent Mathewson had previously testified that he did tap one of them, either the Petitioner or Williams, on the shoulder after they left the airport terminal.

The agent, after stopping Williams and the Petitioner, showed his credentials as a special agent for the Drug Enforcement Administration. He informed the men of particular problems with drugs being brought into the Atlanta area and asked them to show identification. Tommy Reid, Jr., the Petitioner, showed Agent Mathewson a credit card issued to Tommy Reid Jr. and airline tickets which indicated that Tommy Reid Jr.'s credit card was used to pay for both Reid's and Williams' airline tickets. The agent testified that Reid was nervous. The agent asked their purpose for being in Florida and determined that they had stayed less than 26 hours with

friends. He asked them if they would cooperate with him and in order to eliminate his suspicions of them to accompany him back to the airport and allow him to conduct a quick pat-down search of their persons and to look in their purses. Agent Mathewson testified that Williams said "yea, okay" and that Mr. Reid stated nothing in response to his request.

Subsequent to this conversation, the agent accompanied the Petitioner, Tommy Reid, Jr. and Claude Williams back into the terminal at which point the Petitioner ran away from the agent down the concourse. Subsequently the Petitioner was apprehended. Later, a purse which contained suspected cocaine and which was alleged by the State to be the purse that the Petitioner had been carrying when he was initially stopped, was found in the general area where the Petitioner was apprehended.

Subsequent to the order of the Superior Court, the State of Georgia appealed to the Court of Appeals of Georgia. The Court of Appeals of Georgia reversed the trial court and ruled that the existence of the drug courier profile provided sufficient articulable suspicion to stop the Petitioner prior to his arrest.

On June 20, 1979 the Georgia Supreme Court denied a Petition for Writ of Certiorari filed by the Petitioner. Subsequent to this on June 28, 1979 a separate panel of the Georgia Court of Appeals, which did not consider the Petitioner's case, in the case of *Bowers v. State*, Georgia Court of Appeals (no. 57355 decided June 28, 1979), held that in the situation of the so-called "profile stop" the requisite articulable suspicion was not present. The decision in the Court of Appeals in *Bowers* is attached hereto as Appendix E.

REASONS FOR GRANTING THE WRIT

1.

THE CASE PRESENTS FOR REVIEW AN ISSUE WHICH HAS BEEN EXPRESSLY RULED UPON BY FEDERAL COURTS WITH A RESULT CONTRARY TO THAT RENDERED BY THE COURT OF APPEALS IN THE STATE OF GEORGIA.

The holding of the Court of Appeals of Georgia is contrary to the holding of this Court in *Terry v. Ohio*, 392 U.S. 1 (1967) and *Davis v. Mississippi*, 394 U.S. 721 (1969). *Terry, supra* established the principle that an investigative seizure requires the existance of an "articulable suspicion" by the police officer to justify the intrusion upon the freedom of individuals. The Supreme Court of the United States stated at page 19 n. 16:

> "We thus decide nothing today concerning the constitutional propriety of an investigative 'seizure' on less than probable cause for all purposes of 'detention' and/or interrogation. Obviously not all personal intercourse policemen and citizens involve 'seizures' of all persons. Only when the officer, by means of physical force or *show of authority*, has in some way restrained the liberty of a citizen, may we conclude that a 'seizure' has occurred. . . ." (Emphasis added)

The notion that the Fourth Amendment is not applicable prior to a technical arrest is repudiated in *Davis, supra* at page 727:

> ". . . Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' We made this explicit only last term in *Terry v. Ohio*, 392 U.S. 1, 19, 20, L.Ed.2d 889, 904, 88 S.Ct. 1868 (1968) when we *re-*

jected the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officer stops short of something called a 'technical arrest' or a 'full-blown search'." (Emphasis added)

Based upon these decisions, the Courts of Appeal of several circuits of the United States have rejected the notion that the so-called "drug courier profile" provides articulable suspicion to justify an investigative seizure. *U.S. v. Rios,* 594 Fed.2d 320 (2d Cir. 1979); *U.S. v. Ballard,* 573 Fed.2d 913 (5th Cir. 1978); *U.S. v. McCaleb,* 552 Fed.2d 717 (6th Cir. 1977); *U.S. v. Lewis,* 556 Fed.2d 385 (6th Cir. 1977); *U.S. v. Pope,* 561 Fed.2d 663 (6th Cir. 1977). These cases are specifically applicable to the drug courier profile. In *Rios, supra* the Court of Appeals for the Second Circuit describes the drug courier profile as nothing more than a basis for continued surveillance.

Two days prior to the denial of the Petitioner's petition to the Georgia Supreme Court, the Supreme Court of the United States in the case of *Torres v. Puerto Rico,* 47 L.W. 4716 (U.S. S.Ct. Case no.: 77-1609, decided June 18, 1979) decided that a search of an individual who had entered an airport in Puerto Rico on a flight from Miami, Florida was invalid even though a statute of Puerto Rico attempted to create a right of police to search a person who was merely suspected by the police. The Court struck down the statute as being unconstitutional and held that the requirement for probable cause and articulable suspicion applies even in opposition to a statute of a state or territory.

An even more recent case, *Brown v. Texas,* 47 L.W. 4810 (U.S. S.Ct. Case no.: 77-6673, decided June 25, 1979) held that a Texas statute authorizing police officers to approach individuals and request identification was unconstitutional.

These results are contrary to the holding of the Court of Appeals of the State of Georgia in the case *sub judice* as that Court specifically stated that the existence of elements of the courier profile create the articulable suspicion sufficient to justify investigative seizure.

2.

THE PETITIONER'S CASE WOULD BE DECIDED DIFFERENTLY IF IT HAD BEEN DECIDED BY A DIFFERENT PANEL OF THE GEORGIA COURT OF APPEALS.

The Court of Appeals of Georgia by means of a different panel of judges in the case of *Bowers v. State* (Georgia Court of Appeals No. 57355) has decided since the date of the denial of the Petitioner's Writ of Certiorari by the Supreme Court of Georgia that the so-called "drug courier profile" does not provide an articulable suspicion to seize an individual. This, of course, was decided with that panel's awareness of *Torres v. Puerto Rico,* 47 L.W. 4716 (U.S. S.Ct. Case no.: 77-1609, decided June 18, 1979) and *Brown v. Texas,* 47 L.W. 4810 (U.S. S.Ct. Case No.: 77-6673, decided June 25, 1979).

The result of this decision by the Court of Appeals of Georgia means that there has been an inconsistent application of the law by the Appellate Courts of the State of Georgia in regard to the Petitioner and had his case been decided by that same panel the decision would have been different.

CONCLUSION

Since the holding of the Court of Appeals of the State of Georgia is contrary to the holdings of both the Supreme Court of the United States and all Circuit Courts of Appeal of the United States which have addressed the issue and further since the Court of Appeals of the State of Georgia has itself now taken a position contrary to the position with regard to the Petitioner, the Writ of Certiorari should be granted to review the judgment and opinion of the Georgia Court of Appeals with regard to the Petitioner.

Respectfully submitted,

DENNIS S. MACKIN
Attorney for Petitioner

COHEN, MACKIN & POLLOCK
1550 Peachtree Summit Bldg.
401 West Peachtree Street, N.W.
Atlanta, Georgia 30308

CERTIFICATE OF SERVICE

I hereby certify that I have made service in the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States of America by depositing a copy of same in the United States mail with sufficient postage affixed thereto, addressed to each of the following:

MR. ARTHUR BOLTON
Attorney General, State of Georgia
132 State Judicial Bldg.
Atlanta, Georgia 30334

MR. MORGAN L. THOMAS
Clerk, Court of Appeals, State of Georgia
433 State Judicial Bldg.
Atlanta, Georgia 30334

MR. LEWIS R. SLATON
District Attorney, Fulton County
Third Floor
Fulton County Courthouse
136 Pryor Street, S.W.
Atlanta, Georgia 30303

This _____ day of September, 1979.

DENNIS S. MACKIN
Attorney for Petitioner

Appendices

APPENDIX A

[April 4, 1979]

57466. THE STATE v. REID. Ba-57

BANKE, Judge.

The defendant was charged with violation of the Georgia Controlled Substances Act. A motion to suppress was filed by counsel. After a hearing, the trial judge granted defendant's motion to suppress. The state appeals.

An agent for the United States Department of Justice, Drug Enforcement Administration, was on surveillance duty at the Atlanta Airport in the early morning hours of the day in question. He observed the defendant and another man arrive on a flight from Fort Lauderdale, Florida. Both carried identical large men's purses. Each maintained a distance from the other as they exited the arrival area with the defendant in the lead, looking back occasionally as if to determine the location of the other. Both continued separated, past the baggage claim area toward the front door of the terminal. As they reached the main lobby of the airport, the defendant's companion caught up with him and spoke a few words. The two picked up their pace and hurried toward the front door.

As they exited the terminal through the front door, the agent caught up with them, identified himself, and asked to see their airline tickets and identification. Both produced the tickets, which indicated they had both been purchased with the defendant's credit card and that their trip from Atlanta to Fort Lauderdale and return encompassed just slightly more than one full day. During this time both appeared nervous. The agent asked the two men if they would cooperate with him by returning inside the terminal and consenting to a quick pat-down search

and a look into their purses. The defendant nodded affirmatively, and his companion replied, "Yeah, okay."

Just as they re-entered the terminal, the defendant began running, still in possession of his purse. After receiving the aid of an Atlanta police officer to secure the companion, the agent pursued and captured the defendant, who no longer was in possession of his purse. After retracing the route of the defendant, an apparently identical purse was found about 100 feet from the place where the defendant was caught.

The trial judge in granting the motion based his ruling on the lack of an "articulable suspicion" on the part of the agent for his decision to stop the defendant. *Held:*

1. The decision to stop the defendant and his partner was obviously based on the fact that they, in a number of respects, fit a "profile" of drug couriers compiled by the United States Drug Enforcement Administration. Fort Lauderdale, the agent testified, is the leading distribution point for cocaine in the United States. The early morning flights offer lowest chances for detection because of decreased law enforcement activity. Couriers travelling together often wish to disguise that fact, and the lack of baggage is also a factor. These factors constituted an "articulable suspicion" sufficient to justify a short investigatory detention. Terry v. Ohio, 392 U. S. 1 (1967). "The fourth amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow . . . a criminal to escape." Adams v. Williams, 407 U. S. 143 (1971). Accord: *Brisbane v. State,* 233 Ga. 339 (211 SE2d 294) (1974); *Allen v. State,* 140 Ga. App. 828 (232 SE2d 250) (1976); *Anderson v. State,* 123 Ga. App. 57 (179 SE2d 286) (1970).

2. In its ruling on the motion, the trial court found "that at the time the officer suggested these men go back into the airport with him that by that time they were quote under arrest end quote." The only evidence heard by the trial court was that given by the agent of the Drug Enforcement Administration who testified that the defendant and his companion consented to return to the terminal. The agent was not dressed in a uniform, although he did produce his credentials. He was wearing blue jeans and a light weight jacket. He had a gun in the rear area of his waistband, covered by his jacket, and not visible to the defendant and his companion. He was alone. There is no suggestion that the defendant was reluctant to return to the terminal. There is also no evidence of coercion, youth, lack of education, low intelligence, harsh questioning, or use of physical force. *State v. Rivers,* 142 Ga. App. 96 (235 SE2d 393) (1977). Whether consent was given is to be determined from the totality of the circumstances. Shneckloth v. Bustamonte, 412 U. S. 218 (1973). At the conclusion of the state's evidence on the motion, both sides when questioned by the trial judge, indicated they had nothing further to present. The evidence of consent is unrebutted. Therefore, we hold that the trial court erred in finding that the defendant was under arrest.

3. Given a permissible "Terry stop" and a freely given consent to return to the terminal for "the pat-down and look in the purse," there is ample authority for the proposition that flight in connection with the other circumstances would provide probable cause for the subsequent apprehension and search of the purse discarded in defendant's flight. *Cook v. State,* 136 Ga. App. 908, (222 SE2d 656) (1975); *Green v. State,* 127 Ga. App. 713 (194 SE2d 678) (1977).

Judgment reversed. Shulman and Underwood, JJ., concur.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, April 24, 1979

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

57466. THE STATE v. TOMMY REID, JR.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

NOTE: Page 3 re-typed on Motion for Rehearing. Please substitute attached new page 3 for old one. (Opinion dated April 4, 1979)

COURT OF APPEALS
OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA, April 24, 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS
Clerk

to disguise that fact, and the lack of baggage is also a factor. These factors constituted an "articulable suspicion" sufficient to justify a brief stop for questioning, although certainly not sufficient to justify arrest or search. Terry v. Ohio, 392 U. S. 1 (1967). "The fourth amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow . . . a criminal to escape." Adams v. Williams, 407 U. S. 143 (1971). Accord: *Brisbane v. State*, 233 Ga. 339 (211 SE2d 294) (1974); *Allen v. State*, 140 Ga. App. 828 (232 SE2d 250) (1976); *Anderson v. State*, 123 Ga. App. 57 (179 SE2d 286) (1970).

2. In its ruling on the motion, the trial court found "that at the time the officer suggested these men go back into the airport with him that by that time they were quote under arrest end quote." The only evidence heard by the trial court was that given by the agent of the Drug Enforcement Administration who testified that the defendant and his companion consented to return to the terminal. The agent was not dressed in a uniform, although he did produce his credentials. He was wearing blue jeans and a light weight jacket. He had a gun in the rear area of his waistband, covered by his jacket, and not visible to the defendant and his companion. He was alone. There is no suggestion that the defendant was reluctant to return to the terminal. There is also no evidence of coercion, youth, lack of education, low intelligence, harsh questioning, or use of physical force. *State v. Rivers*,

APPENDIX C

SUPREME COURT OF GEORGIA

ATLANTA, June 20, 1979

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

TOMMY REID, JR. v. THE STATE

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

BILL OF COSTS, $30.00

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE, ATLANTA July 24, 1979

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia, and that Cohen, Mackin & Pollock paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ JOLINE B. WILLIAMS
Clerk

CASE NO. 57466

COURT OF APPEALS OF GEORGIA

REMITTITUR FROM SUPREME COURT

Filed in office

Clerk Court of Appeals of Georgia.

APPENDIX D

PERTINENT PORTIONS OF THE UNITED STATES CONSTITUTION

The pertinent portions of the United States Constitution are as follows:

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED AND NO WARRANTS SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED AND THE PERSON AND THINGS TO BE SEIZED.

APPENDIX E

[Filed June 28, 1979]

778

QUILLIAN, P. J.

SMITH & BIRDSONG, JJ.

57355. BOWERS v. THE STATE Sm-45

SMITH, Judge.

This case is before us upon our grant of appellant's application for interlocutory review. Because probable cause was lacking for the arrest pursuant to which police seized the objectionable evidence from appellant, we must reverse the trial court's denial of appellant's motion to suppress.

Appellant was traveling by plane from Miami, Florida, to Columbus, Ohio, and his itinerary included a brief stopover at Hartsfield International Airport, for the purpose of catching a connecting flight. Appellant had about twenty minutes time to catch his departing flight, and he was thus quite rushed in proceeding to gate 44, the gate of his intended departure. On arriving there and exchanging his airline ticket for a boarding pass, appellant was accosted by B. A. Glover, a narcotics agent who identified himself as such. Glover took appellant's pass from his possession and noted the name thereon, Peter Barnes. Then, as Glover testified: "I asked him if his name was Peter Barnes, which [sic] he replied, yes. I asked him where he was going and he replied he was going to Columbus, Ohio. I asked if he had any type of identification on him and he said that he did not. At that point in time, I informed him that I was conducting a narcotics investigation and asked him if he would walk with me down to the police precinct there in the terminal building." Appellant expressed concern that he might be caused to

miss his flight, but to no avail, and he accompanied Glover as directed. Upon their reaching the station, which was downstairs and some three hundred feet away from gate 44, appellant identified himself as Gary Bowers, and Glover told appellant he was under arrest for providing false identification to a police officer during an investigation. A search which followed uncovered the contraband.

Glover's initial stop of appellant was based upon Glover's own observation of appellant and upon information relayed to Glover by an investigator stationed at the Miami airport, who had witnessed appellant's activities on department from that city. Both agents noticed that appellant appeared nervous. The Miami investigator had observed that appellant paid cash for the ticket he purchased minutes before the departure of his flight, that he left a call-back number of an airport pay phone, and that he carried on whispered conversation with a "friend." These observations were supposedly consistent with a drug courier profile" prepared by the Unived Stated Drug Enforcement Administration.

The State has not contended at any time that probable cause existed to arrest appellant at the time that Glover initially accosted him. (In fact, such probable cause did not exist.[1]) Rather, the State's contention, in the trial

[1] In Torres v. Puerto Rico, 47 LW 4716 (U.S. Supreme Court Case No. 77-1609, decided June 18, 1979), the facts were as follows. Torres, a Florida resident, arrived at the San Juan airport aboard a flight from Miami. A police officer's suspicions were aroused when he observed that Torres seemed nervous and kept looking at an armed, uniformed officer stationed nearby in the airport. There was, however, no reason to suspect that Torres was carrying contraband. When Torres claimed his baggage, the officer stopped him, identified himself as an agent and took Torres to the airport police office, where an ensuing search revealed contraband. Torres was then arrested, and the Supreme Court of Puerto Rico affirmed his conviction for possession of marijuana. The Commonwealth of Puerto Rico contended that the search was legal based upon Public Law 22, §1, P.R.

court and on appeal, is that the initial detention was warranted as a Terry [2] stop, that the Terry stop continued from the waiting area of gate 44 to the police station downstairs, and that the conducted search was proper as incident to the arrest made upon Glover's discovery, in the station, that appellant was using an alias. Assuming arguendo that the facts justified a Terry stop, nevertheless we cannot accept the State's contention. Instead, the evidence demands the conclusion that the brief detention for questioning contemplated by Terry had been accomplished and appellant was under arrest when he, bereft of his boarding pass and of any means to depart, was told by a narcotics agent to accompany him to the police pre-

Laws Ann., Tit. 25, §1501 (Supp. 1977), which provides: "The Police of Puerto Rico is hereby empowered and authorized to inspect the luggage, packages, bundles, and bags of passengers and crew who land in the airports and piers of Puerto Rico arriving from the United States; to examine cargo brought into the country, and to detain, question, and search those persons whom the Police have grounds to suspect of illegally carrying firearms, explosives, narcotics, depressants or stimulants or similar substances." Reversing Torres' conviction in agreement with his contention that his Fourth Amendment rights had been violated, the Supreme Court stated: "The search of appellant's baggage pursuant to Public Law 22 did not satisfy the requirements of the Fourth Amendment as we heretofore have construed it. First, the grounds for a search must satisfy objective standards which ensure that the invasion of personal privacy is justified by legitimate governmental interests. Delaware v. Prouse, 440 U.S. _____, _____ _____ (1979). The governmental interests to be served in the detection or prevention of crime are subject to traditional standards of probable cause to believe that incriminating evidence will be found. Yet Public Law 22 does not require, and the officers who made the search challenged here did not have probable cause for such belief.

"Second, a warrant is normally a prerequisite to a search unless exigent circumstances make compliance with this requirment impossible. Mincey v. Arizona, 435 U.S. 385, 393-394 (1978). Yet Public Law 22 requires no warrant and none was obtained before appellant's bags were searched." Torres, supra, p. 4718.

[2] Terry v. Ohio, 392 U.S. 1 (88 SC 1868, 20 LE2d 889) (1968).

cinct. Probable cause to arrest undisputedly being absent at that time, the ensuing arrest and search were unlawful.

"A composite picture emerges of the 'Terry-type' stop. It is a brief stop, limited in time to that minimally necessary to investigate the allegation invoking suspicion, and limited in scope to identification . . . and limited questioning reasonably related to the circumstances that justified the initiation of the momentary stop." *Radowick v. State,* 145 Ga. App. 231, 237 (244 SE2d 346) (1978). As in *Radowick,* the detention here overreached its purpose and thus became an illegal arrest. "An arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force, and the arrest is complete." *Clements v. State,* 226 Ga. 66, 67 (172 SE2d 600) (1970). "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be terms 'arrest' or 'investigatory detentions.' " Davis v. Mississippi, 394 U.S. 721, 726 (89 SC 1394, 22 LE2d 676) (1969).

Judgment reversed. Quillian, P. J., and Birdsong, J., concur.

ON MOTION FOR REHEARING

It is interesting to note that the state in its motion for rehearing cited four federal circuit court cases, which are not binding on this court. Also the state cited several state cases. However, it made absolutely no attempt to answer Torres v. Puerto Rico, 47 LW 4716 (U.S. Supreme Court Case No. 77-1609, decided June 18, 1979) which is binding on this court. In Torres the Supreme Court of the United States confronted the issue of the so called "drug courier profile" and stated that "the detection or prevention of crime are subject to traditional standards of probable cause." In the process, the court struck down a law of Puerto Rico which seemingly attempted to replace the traditional Fourth Amendment standard of probable cause with the "drug courier profile." See footnote 1 in this opinion.

"The requirement of probable cause has roots that are deep in our history." Henry v. United States, 361 U.S. 98, 100 (80 S.Ct. 168, 4 L.Ed.2d 134) (1959). "Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that '*common rumor or report, suspicion, or even "strong reason to suspect*" was not adequate to support a warrant for arrest.' " Dunaway v. State of New York, 57 LW 4635 (U.S. Supreme Court Case No. 78-5066, decided June 5, 1979) (Emphasis supplied.) The Supreme Court of the United States in United States v. Brignoni-Ponce, 422 U.S. 873, p. 878 (95 SCt. 2574, 45 L.Ed.2d 607) (1974), in dealing with seizure of the person under the Fourth Amendment, said: "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest. Davis

v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 (1968). '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person,' id., at 16, and the Fourth Amendment requires that the seizure be " 'reasonable.' "

In the case at bar, when the police officer took the boarding pass he had restrained appellant from walking away. When he then told the protesting appellant to go with him to the station house and kept the boarding pass, he definitely removed any doubt as to an arrest under the Fourth Amendment. There having been no probable cause for that arrest, everything from that point forward was illegal and the obtained evidence was inadmissible.

Two other recent U.S. Supreme Court opinions concern facts analogous to the situation before us. In Brown v. State of Texas, 47 LW 4810 (U.S. Supreme Court Case No. 77-6673, decided June 25, 1979), two police officers sighted Brown and another man walking away from each other. This was in an area with a high incidence of drug traffic. The officers stopped, and one officer testified that he stopped Brown because the situation "looked suspicious and we had never seen that subject in that area before." Ibid. The officers did not claim to suspect Brown of any specific misconduct, nor did they have any reason to believe that he was armed. Brown was arrested under a Texas statute that made it a criminal act for a person to refuse to give his name and address to an officer " 'who ha[d] lawfully stopped him and requested the information.' " Ibid. Holding that Brown's Fourth amendment rights had been violated, the court reasoned: "The reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway v. New York*, U.S. , (1979); *Terry v. Ohio, supra*, at 20, depends 'on a balance between the public interest and the individual's

right to personal security free from arbitrary interference by law officers.' *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce, supra*, at 878. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty. See, *e.g., id.*, at 878-883.

"A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expection of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. See *Delaware v. Prouse*, 440 U.S. , (1979); *United States v. Brignoni-Ponce, supra*, at 882. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. *Delaware v. Prouse, supra*, at . See *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-562 (1976).

"The State does not contend that appellant was stopped pursuant to a practice embodying neutral criteria, but rather maintains that the officers were justified in stopping appellant because they had a 'reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed.' We have recognized that in some circumstances an officer may detain a suspect briefly for questioning although he does not have 'probable cause' to believe that the suspect is involved in criminal activity as is required for a traditional arrest. *United States v. Brignoni-Ponce, supra*, at 880-881. See *Terry v. Ohio*, 392

U.S. 1, 25-26 (1968). However, we have required the officers to have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity. *Delaware v. Prouse, supra,* at ; *United States v. Brignoni-Ponce, supra,* at 882-883; see also *Lanzetta v. New Jersey,* 306 U.S. 451 (1938).

"The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. Officer Venegas testified at appellant's trial that the situation in the alley 'looked suspicious,' but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct. In short, the appellant's activity was no different from the activity of other pedestrians in that neighborhood. When pressed, officer Venegas acknowledged that the only reason he stopped appellant was to ascertain his identity. The record suggests an understandable desire to assert a police presence; however, that purpose does not negate Fourth Amendment guarantees.

"*In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tiltes in favor of freedom from police interference.* The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: Prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits. See *Delaware v. Prouse ,supra,* at (slip op., at 12-13)." (Emphasis supplied.)

In Delaware v. Prouse, 440 U.S. (SCt , LE2d) (Case No. 77-1571, decided Mar. 27, 1979), the court continues to hammer away at the law officers' practice of choosing at random the person or persons they wish to stop and question. In that case, a patrolman in a police cruiser stopped an automobile occupied by respondent and seized marijuana in plain view on the car floor. Respondent was subsequently indicted for illegal possession of a controlled substance. At a hearing on respondent's motion to suppress the marijuana, the patrolman testified that prior to stopping the vehicle he had observed neither traffic or equipment violations nor any suspicious activity, and that he made the stop only in order to check the driver's license and the car's registration. The patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General. The court at page 5 of the slip opinion, stated: "The Fourth and Fourteenth Amendments are implicated in this case because stopping an automobile and detaining its occupants constitute a " 'seizure" ' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief. [Cits.] The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials,

including law enforcement agents, in order ' "to safeguard the privacy and security of individuals against arbitrary invasion . . .' " In addition, the court stated: "Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. As *Terry v. Ohio, supra,* recognized, people are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles. See *Adams v. Williams,* 407 U. S. 143, 146 (1972).

"Accordingly, we hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment." Id. (slip op., p. 14).

Likewise, in the instant case neither is one shorn of his right to privacy when he disembarks from an airplane in Atlanta, Georgia. This is true despite the fact that some police officer in Ft. Lauderdale calls an officer at the Atlanta airport and tells him that the disembarking passenger resembles a drug courier. To allow such would be to encourage the development of a police practice of searching homes as well as individuals because they fit a profile. This case presents but another attempt to substitute some word or practice to circumvent the probable cause requirement of the Fourth Amendment. The court realizes that crime is rising, but some way can and must

be found to combat it without destroying the constitutional rights of law-abiding citizens. The Constitution and laws were and are fashioned to protect the innocent and, in the process of so doing, to ferret out the guilty. To allow the police action here advocated by the state would be to deny every American citizen's constitutional right of privacy.